IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 892 OF 2004

Babanrao Budhaji Nanekar ... Appellant

V/s

Bhimrao Yadavrao Shelke ... Respondent

Mr. Rajiv Patil holding for Ms. Sangita Bhole & Sneha Sakhalkar for the appellant.

Mr. V.P. Sawant for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 4TH JULY, 2005

P.C.:

1. This is an appeal preferred by the appellant against the judgment and order passed by the Addl. District Judge, dated 31.7.2003 dismissing his appeal and confirming the judgment and order passed by the Civil Judge, Jr.Divn., Pune, dated 19.4.1999 dismissing the suit and also rejecting the counter-claim.

2. I have heard the learned counsel for both parties. Perused the record.

3. The plaintiff filed the suit for declaration and

injunction on the ground that property bearing No.8/1, 8 Ares located at Mouje-Hingane Budruk, Karvenagar, Tal. Haveli, Dist. Pune, is the subject matter and out of this property, the plot having construction of two rooms thereof is the suit property. The plaintiff purchased the property with an easementary right of passage over the common staircase by a registered sale deed dated 26.11.1992. The defendant has his plot adjoining to the plot of the plaintiff towards Northern side and started construction work thereon. According to the plaintiff, the defendant has made encroachment to the extent of 22 ft. in the open site behind the Northern wall of the plaintiff's house and while constructing he has taken support of the wall of the plaintiff's house and wall of the staircase for his construction. Hence the suit came to be filed.

The defendant contested the suit on the ground that there was no encroachment and the allegations made by the plaintiff were false.

4. The learned Trial Judge heard both parties and adjudicated the dispute on merits and came to the conclusion that the plaintiff though proved that he was owner of the suit property, failed to establish that

defendant was constructing on his property illegaly and unauthorisedly. It was also held that the plaintiff failed to prove that there was encroachment to the extent of 22 ft. There was also counter-claim, however, it was also rejected on merits.

The appeal was carried to the District Court by the present appellant. However, on hearing both sides and on the basis of available evidence on record, the learned Addl. District Judge, Pune, dismissed the appeal. Hence the present appeal.

5. At the outset, there is no substantial question of law involved in this appeal. The only issue round which the entire case revolves is, whether there was an existence of any encroachment for which purpose the Court Commissioner was appointed. The report alongwith the testimony of the Court Commissioner were the basis for determination of the issue. The learned lower appellate Court Judge has come to the conclusion that it was an admitted position by the Court Commissioner that it is not possible to find out the encroachment unless both the properties are measured and when admittedly the property belonging to defendant only was measured, there cannot be positive finding to the effect whether there

was any encroachment or not. It is needless to mention that in determining the alleged encroachment, it is necessary that measurements of both the adjacent properties is required to be taken up in order to determine the existence and extent of encroachment which point is admittedly lacking in the present case.

In the result, the findings recorded by the lower appellate Court to the extent that defendant did not prove that plaintiff had encroached upon his property to the extent of 44 sq.ft. area, is not established. Similarly, the defendant's claim of Rs.23,000/- was also rejected apparently by giving cogent reasons on the basis of available evidence.

With these aspects, I am satisfied that both the Courts below have properly appreciated the entire evidence on record and, therefore, it would brook no interference. In the result, the appeal stands dismissed with no order as to costs.

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